

The judgment proceeded to reaffirm the view expressed by Sir Benson Maxwell, C.J. in *Choa Choon Neoh v. Spottiswoode*, (1 Kyshe p. 216 at p. 221) which had already been cited with approval in the Privy Council case of *Yeap Cheah Neo v. Ong Cheng Neo*, (L.R. 6 P.C. 381 at p. 396). The case of *Choa Choon Neoh v. Spottiswoode*, was decided in 1869 and dealt in particular with the application of the English rule as to perpetuities, but in his judgment Sir Benson Maxwell was clearly adopting the more general principles laid down by him in 1858 in the well known case of *Regina v. Willans*, 3 Kyshe p. 16, where he decided that such native law as had been recognized up to 1858 had been so recognized not because of the Charters but because of the general principles of English Law, and that following such principles certain native religions and customs would have been recognized even if the Charters had been silent on the subject. In the course of his judgment he says "But where the law of the place is inapplicable to the parties by reason of peculiarities of religious opinions and usages, then from a sort of moral necessity the validity of the marriage depends on whether it was performed according to the rites of their religion." On the other hand, in the Six Widows case, *Choo Ang Chee v. Neo Chan Neo & others*, 12 S.S.L.R. p. 120, Sir Thomas Braddell, who was the Judge of first instance, and Sir W. Hyndman-Jones in the Court of Appeal, both relied on the particular words of the Charter which gave the Courts of the Colony jurisdiction in ecclesiastical matters "so far as the several religions, manners and customs of the inhabitants of the said Settlements and places will admit." Although the Six Widows Case did not go to the Privy Council, the correctness of the decision has been upheld in subsequent Privy Council cases (see *Cheang Thye Phin v. Tan Ah Loy*, L.R. 1920 A.C. p. 369 and the first *Khoo Thean Tek* case, *Khoo Hooi Leong v. Khoo Hean Kwee*, L.R. 1926 A.C. p. 529).

The decision in the second *Khoo Thean Tek* case, 1930 A.C. p. 346, does not refer to the Charters at all, and it would appear that the *ratio decidendi* was the principle enumerated by Sir Benson Maxwell in *Regina v. Willans* and adopted by Sproule, J. in the Court of first instance and Stevens, J. in the Court of Appeal. I do not think, however, that there is any inconsistency between the Privy Council approving the principle laid down by Sir Benson Maxwell and also approving the argument founded on the particular words in the Charters as applied to the ecclesiastical jurisdiction of the Courts. It will be noticed that in ecclesiastical matters the Charters refer specifically to native "religions, manners and customs," whereas in civil matters generally the Charters direct the law of England to be applied "so far as circumstances will admit."

There does not appear to be any essential distinction and if the law of England has, to a limited extent and where justice requires it, given a modified recognition to certain native customs, manners and religions, the Charters have only made explicit what was already implicit. In either case the principle is clear and it is, as stated by the Privy Council, "the necessity of preventing the injustice or oppression which would ensue if that law (the law of England) were applied to alien races unmodified."

Applying these principles to the facts of the present case, I am unable to accept the argument that because the plaintiff would fail in her action if the strict rules of Mohammedan Law were applied, she must also fail under the application of English law to persons of her religion. One starts with the basis that the plaintiff has all the rights which she would have under English principles of law and one of such rights is undoubtedly a right to claim for damages for breach of promise of marriage aggravated by seduction. Can it be said that if these principles were applied strictly it would result in injustice or oppression? It appears to me that if she can prove her case the converse proposition would be more correct, namely that injustice and oppression would result if such principles were not applied. I am quite prepared to listen to argument that the status of a Mohammedan married woman is different to that of the status of a woman married according to English law and that accordingly damages cannot be assessed on the same principles, but that would merely affect the quantum, and not abrogate the right to sue.

I find therefore that the defendant's preliminary objections fail and that the action must proceed on the merits.

Order accordingly.

Solicitor for the Plaintiff—K. P. K. Menon.

Solicitors for the Defendant—Rodyk & Davidson.

[CRIMINAL REVISIONAL JURISDICTION]

HUGGARD, C.J.

April 30, 1935.

REX vs. NADAI SON

[SINGAPORE MISCELLANEOUS APPLICATION]

No. 1 of 1935]

Ordinance No. 61 (Pawnbrokers) S. 28 (1).
—Conditional Order for return of pawned articles.

The making of a conditional order under S. 28 (1) of Ordinance No. 61 (Pawnbrokers) is a matter within the discretion of the Magistrate but such discretion must be exercised upon definite grounds. There must be something arising from the conduct of the owner or from the other circumstances of the case before the Court can properly deprive an owner of his right to the unconditional return of property which has been stolen from him.

Criminal Revision.

Worley, D.P.P., for the Crown.

Walters for the pawnbroker.

The facts and arguments sufficiently appear from the Judgment.

HUGGARD, C.J.—This is an application by the learned Deputy Public Prosecutor, under section 312 A of the Criminal Procedure Code, for revision of an order made by the Second Magistrate, Singapore, regarding the disposal of certain jewellery.

The facts are simple and are not in dispute. In October, 1934, certain articles of jewellery were stolen from a woman named Patemahbi. In due course the thief, one Nadaison, was arrested. He pleaded guilty and was sentenced to two months rigorous imprisonment.

At the hearing before the Magistrate various articles of jewellery and a certain amount of cash were produced, and at the conclusion of the trial the Magistrate made an order for the disposal of this property. In this application we are only concerned with that order so far as it relates to:—

- (1) a gold necklace (Exhibit A);
- (2) a wrist chain (Exhibit D);
- (3) two pairs of bangles and two rings (Exhibits C1, C2, E1 and E2).

The gold necklace was admittedly portion of the stolen property and was recovered from the Yong Shin pawnshop in Rochore Road where it had been pawned by the thief for \$120.

The wrist chain did not form part of the stolen property but it was found in the possession of the thief and admittedly represented the proceeds of sale or exchange of part of the stolen property.

The bangles and rings belonged to the thief and were found in his possession, but they had previously been pawned by him at the Yong Shin pawnshop and had been redeemed out of the \$120 which he had raised on the necklace (Exhibit A).

Now, as regards the necklace the Magistrate ordered that it should be returned to the owner, Patemahbi, on payment by her to the pawnbroker of the sum for which it had been pawned by the thief. This order was made under section 28 (1) of Ordinance No. 61 (Pawnbrokers), the relevant portion of which reads as follows:—

“If any person is convicted in any Court of feloniously taking or obtaining any goods and chattels, and it appears to the Police or other Court that the same have been pawned with a pawnbroker, the Court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or any part thereof, or without payment thereof or of any part thereof, as to the Court, according to the conduct

of the owner and the other circumstances of the case, seems just and fitting.”

I think it is clear that apart from this section the Magistrate would have had no power to make a *conditional* order for the return of the necklace to the owner. Speaking generally, once the identity of a stolen article has been established, the owner is entitled to its unconditional return. A pawnbroker with whom the article may have been deposited by the thief has no *legal* claim to it. In *Rex v. Chop Sum Thye*, (1933) S.S.L.R. 503, where the facts were to all intents and purposes on all fours with those in the present case, except that in that case the Magistrate had ordered the unconditional return of the property to its owner, Deane, J. said at page 507:—

“And what is the title of a pawnbroker? He holds by bailment and therefore his position cannot, in law, be better than that of his bailor. When therefore it has been shown that the bailor's title is through theft, and the thief has actually been convicted, there is nothing more to be said, and no need to hear the pawnbroker, he has no title; and the Court can with a perfectly clear conscience proceed to order the return of the goods without hearing him in person since he has in fact been heard through his bailor. The only rights then left to the pawnbroker are his rights against the bailor and these of course the Court does not interfere with in any way; his rights over the property which were conferred upon him by the bailor are taken away since it has been proved to the Court that the bailor had none to give.”

As, therefore, a pawnbroker has no *legal* right, as against the owner, to property pawned to him by a thief, it is clear that section 28 (1) of the Pawnbrokers Ordinance creates an exception to the general law and enables a Court, in certain circumstances, to make an order more favourable to the pawnbroker than would otherwise be possible.

What, then, are the circumstances in which a Court should make a *conditional* order for the delivery of property to the owner thereof? Under the terms of the section itself it would appear that the Court should take into consideration “the conduct of the owner and the other circumstances of the case.” The contention of the learned Deputy Public Prosecutor is that any such order should only be made in an exceptional case, for example, where there has been negligence or collusion on the part of the owner. Mr. Walters, on behalf of the pawnbroker who was served with notice of the present proceedings, contends on the other hand that the making of any such order is within the discretion of the Magistrate and that in the present case this

Court should not interfere with the exercise of his discretion. I agree that the making of a conditional order under the section is in the discretion of the Magistrate, but it is obvious that that discretion must be exercised upon some definite grounds. There must be something arising from the conduct of the owner or from the other circumstances of the case before a Court can properly deprive an owner of his right to the unconditional return of property which has been stolen from him. And I think that one is entitled to expect that the considerations which influenced the Magistrate's mind in making such an order should appear on the face of the record. But in the present case I have not been able to find, either in the notes of evidence taken in the Court below or in the Grounds of Judgment, any indication of any conduct on the part of the owner or any other circumstances which would justify the order that this necklace should be returned to the owner only upon payment by her to the pawnbroker of the sum for which it had been pawned. All that the Magistrate says in his grounds of judgment is:—

"I consider that in this case the best decision is to order the return of the goods to the owner on payment to the pawnbroker of the amount of the loan."

I do not think that this is sufficient. On the facts as disclosed in the record I am of opinion that the Magistrate should have ordered the return of the necklace to the owner unconditionally. This may seem unfair as regards the pawnbroker but he has, of course, his remedy, for what it may be worth, against his bailor, Nadaison.

I might add that in my opinion Magistrates, in considering the question of making restitution orders under section 28 (1) of the Pawnbrokers Ordinance, would be well-advised to bear in mind the following observation of Ridley, J. in *Leicester & Co. v. Cherryman*, 1907, 2 K. B., at page 103:—

"But it is the practice in Courts of Assize, and, I believe, in Courts of quarter sessions also, not to make an order of restitution in a case where the circumstances require that there should be terms imposed, unless the prosecutor consents to compensate the person who has possession of the stolen property."

In the present case the owner of the necklace did not consent, and was not even invited to consent, to compensate the pawnbroker as a condition of the return to her of her property.

Mr. Walters also argued, as regards the necklace, that the Magistrate's order should not be varied even if it was wrong, inasmuch as it would still be open to the owner of the necklace to sue for its unconditional return in the Civil

Courts. It seems clear from the decision in *Leicester & Co. v. Cherryman*, (*supra*) that the making of a restitution order does not affect or alter the civil rights of the parties, but where, as in the present case, the Magistrate's order would appear to have been wrong, it seems to me to be the clear duty of this Court to alter it and so to render it unnecessary for the owner of the property to have recourse to the Civil Courts. As Ridley, J. said in the case cited above, at page 102:—

"The intention (i.e. of the Acts which enable summary restitution orders to be made) was to benefit prosecutors by saving them from the necessity of bringing actions for the return of the property."

Now, as regards the wrist chain (Exhibit D), I have already said that this article was not part of the stolen property but it was found in the possession of the thief and admittedly represented the proceeds of sale or exchange of part of the stolen property. The Magistrate ordered, presumably under section 415 of the Criminal Procedure Code, that this article should be returned to the thief. But in the circumstances of the present case, and having regard to the provisions of sub-section (4) of Section 415, I think that the proper order would have been that it should be delivered to Patemahbi, it being the proceeds of property which had been stolen from her.

As regards the bangles and rings (Exhibits C1, C2, E1 and E2), these were always the property of the thief, Nadaison. They had, as I have said, been pawned by him at the Yong Shin pawnshop but had been redeemed out of the \$120 which he had raised on the necklace. The Magistrate ordered that these articles should be returned to the thief, Nadaison, and I think that in the circumstances here that order was correct. The Complainant Patemahbi cannot, in my view, be entitled to them in view of the fact that she is to receive back her necklace unconditionally. As it was from the proceeds of the pawning of that necklace that the bangles and rings were redeemed, it would mean that if she were now to be given those bangles and rings she would, in the result, receive both the necklace and the equivalent of the proceeds (or most of the proceeds) of the pawning of that necklace. As regards the pawnbroker, I cannot see how he can properly claim the bangles and rings inasmuch as they had been duly redeemed from him and he has received the amount (with interest presumably) for which they were pledged to him.

To sum up therefore, I am of opinion that the necklace (Exhibit A) should be returned to its owner, Patemahbi. I understand, however, that since the date of the Magistrate's order the necklace has been sold by the pawnbroker.

If it is not now possible to recover the necklace the pawnbroker will have to hand over to Patemahbi the proceeds of its sale. I am also of opinion that the wrist chain (Exhibit D) should be handed over to Patemahbi. I therefore vary the order of the Magistrate accordingly in regard to these two articles. I confirm the Magistrate's order as regards the bangles and rings (Exhibits C1, C2, E1 and E2).

There is one other matter to which it is necessary to refer. At the beginning of this Judgment I mentioned that this matter has come before this Court on an application for revision. Mr. Walters for the pawnbroker pointed out that this was a case in which an appeal could have been filed, and he urged that as that course had not been adopted I should now decline to deal with the matter by way of revision. It is, of course, impossible to lay it down as a general rule that in any case where a right of appeal exists and has not been taken advantage of, this Court should decline to exercise its powers of revision. Each case must, in my view, be considered in relation to its own circumstances. In the present case, inasmuch as it does not appear to me that the position of anyone concerned has been prejudiced in any way by the delay which has occurred in bringing the matter before this Court, I do not think I should decline to review an order which, if allowed to stand, would in my opinion effect an injustice to one of the parties concerned.

I find as a fact that the necklace (Exhibit "A") has been sold and cannot now be recovered. I therefore order that the proceeds of its sale (\$126/-) be paid by the pawnbroker to Patemahbi.

Stay on order regarding bangles and rings for 14 days, on footing that if pawnbroker within that time commences a suit against the thief in the District Court in respect of this matter the articles are to be handed over to the District Court to abide result of the suit.

Order accordingly

Worley, D.P.P., for the Crown.
Solicitors for the pawnbroker—

Allen & Gledhill.

[ORIGINAL CIVIL JURISDICTION]

HUGGARD, C.J.

February 6, 1935.

RE CHEW JOO CHIAT, deceased.

LIM SONG KEE

v.

EUGENE ERNEST COLMAN (Official Assignee.
Singapore).

[SINGAPORE SUIT No. 1370 of 1931]

*Civil Procedure Code S. 857—Grant of
Letters of Administration to Official Assignee—*

whether such grant is a grant to the individual or to him and his successors in office.

When a grant of Letters of Administration is made to an Official Assignee under S. 857 of the Civil Procedure Code (now replaced by S. 54 of the Probate and Administration Ordinance 1934) this is a grant to such person in his individual capacity and not a grant to the Official Assignee for the time being and his successors in office.

Adjourned Summons.

This was an application by Defendant for a declaration that the Official Assignee for the time being and at all material times is and has been the administrator of the estate of Chew Joo Chiat deceased, and for certain consequential directions. The Official Assignee for the time being was by consent served and allowed to be heard in the application.

C. H. Smith for the Defendant.

The Official Assignee (*E. B. Williams*) in support of the application.

E. R. Koek for the Plaintiff, and other beneficiaries of the deceased's estate, *contra*.

C. O. Lim for the Official Assignee of the property of Chew Cheng Swee, a bankrupt.

The facts and argument sufficiently appear from the Judgment.

Cur. Ad. Vult.

HUGGARD, C.J.—Section 857 of the Civil Procedure Code (now replaced by Section 54 of the Probate and Administration Ordinance, 1934) empowered the Court in certain events to grant to the Official Assignee or to such other person as the Court thinks fit letters of administration with the will annexed or otherwise as the case requires.

By Order of Court made under this section in Probate No. 136 of 1926, and dated the 28th November, 1927, the Official Assignee was appointed administrator of the Estate of Chew Joo Chiat deceased. The relevant portion of the Order is as follows:—

"And this Court doth further Order that the Official Assignee be appointed Administrator of the said estate of the above-named deceased and that Letters of Administration of the said estate of the above-named deceased be granted to the Official Assignee."

At the date of this Order the holder of the office of Official Assignee was Mr. Eugene Ernest Colman and he took the usual oath required by section 918 of the Code.

Mr. Colman retired from office in December, 1932, having partially administered the estate, and since that date three other officers have successively held the office of Official Assignee and have continued the administration of the estate.

The question for decision on this Summons is whether under the Order mentioned above the